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Supreme Court, U.S.
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No. 93-658

In The

Supreme Court of the United States

October Term, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

WILLIAM DUNN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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In its Petition for Certiorari, the Petitioner seeks relief on grounds not properly before this Court. Specifically, the Petitioner asks this Court to strike punitive damages in all asbestos claims against it because multiple awards violate the due process clause of the Fourteenth Amendment. By asking this Court to grant such an extraordinary remedy, the Petitioner conveniently ignores the fact that the trial court, a panel of the Third Circuit and a majority of the *en banc* Third Circuit found that the Petitioner failed to properly preserve this issue. As discussed herein, certiorari should be denied because:

1. The Petitioner failed to properly preserve this issue by creating a factual record of the issue it now seeks this Court to review.

2. The Court of Appeals decision is not in conflict with any decisions of this Court or any other Court of Appeals.

3. The *en banc* Court of Appeals decision regarding the legal issue raised by the Petitioner is correct.

It should also be noted that the Petition contains essentially the same argument raised in its request to this Court to stay the mandate of the Circuit, which request was denied by Justice Souter.

STATEMENT OF THE CASE

The evidence presented at trial is critical to an understanding of why this Petition should be denied. Since the Petitioner failed to inform this Court of the record made

during the trial, a brief summary of that evidence must first be discussed.

The evidence at trial regarding the conduct of the Petitioner, Owens Corning Fiberglas (hereinafter referred to as "OCF"), was found by both the trial judge and the Court of Appeals to be more than sufficient from which a jury could reasonably conclude that OCF acted "with reckless indifference" in distributing asbestos products without adequate warnings. The evidence supporting the award of punitive damages in this case is summarized in the Third Circuit Opinion and the District Court Opinion denying post-trial relief. (App. to Pet. at 3a-7a and 126a-122a).[1]

The trial evidence unequivocally demonstrated that OCF's top management, including its president and chief operating officer as well as its corporate counsel knew about the danger of asbestos to insulators such as the Respondent ("Dunn") as early as 1941. At that time OCF did not sell asbestos products but sold a competing product containing fiberglass. When threatened by the insulation union that its workers wanted more money to install fiberglass insulation due to its itchy nature, OCF's public relations officer sent a memorandum dated January 7, 1942, to OCF's president and executive vice president stating as follows:

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[1] All citations will be to the Appendix attached to OCF's Petition. References to the trial record are contained in the decisions which are in the Appendix but will not be repeated herein. Counsel is willing to provide these actual references upon request by this Court.

> [g]ather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis. Available are two bibliographies covering medical literature to 1938, citing references to scores of publications in which the lung and skin hazards of asbestos are discussed. This file would cover five or six hundred pages. . . . (App. at 4a)

OCF continued to receive information regarding the health hazards of asbestos over the next two years and avoided using asbestos in its insulation products because of this danger. As noted in another internal OCF memorandum circulated in 1943:

> [i]n formulating our policy on admixtures with asbestos, we should keep on the alert because otherwise *we will run the risk of smearing fiberglas [sic] with the hazards of exposure to asbestos.*
>
> Fabrication of asbestos (in both textile and pretextile form) is a dusty process, and exposure to asbestos fly involves the danger of asbestosis, a pathological lung condition . . . minimized by the use of hoods and . . . respirators. (App. at 5a) (emphasis in original).

Because fiberglass failed to obtain the desired market share in competing with asbestos products, OCF began to distribute asbestos insulation in 1953 despite its prior knowledge of the danger it posed to insulators. From the outset Dr. Garret Schepers, head of the Saranac Laboratory in New York, warned OCF that this product was hazardous to human beings, but OCF ignored these warnings even though they were consistent with OCF's prior knowledge of the adverse health effects of asbestos. As noted by the Third Circuit in its *en banc* opinion:

> Dr. Schepers also wrote two letters to Dr. M.D. Burch, director of personnel and industrial relations at OCF at the time, advising him that "asbestos is fairly well incriminated as a carcinogen," and that asbestos dust caused fibrosis. *Despite these warnings*, OCF published brochures which repeatedly represented Kaylo as "*nontoxic*." In addition, OCF touted Kaylo's "ease of application," and its "pleasant handling characteristics." These brochures contained no warning of potential hazards. (App. at 5a-6a) (Reference to trial record omitted.) (Emphasis added.)

Thus, although OCF's management was willing to use the dangers of asbestos to its commercial advantage when it did not sell this type of product, it had no hesitancy in concealing this known danger when it was commercially advantageous for OCF to do so.

During the 1960s, OCF continued to distribute the product without warnings even though its competition did so and even though its knowledge of the dangers of asbestos to insulators continued to expand. Indeed, OCF knew that it was exposing thousands of workers to this danger but it refused to even place warnings on its asbestos products despite the admonition from corporate personnel that lawsuits are inevitable and "the amounts requested [by claimants] are usually sizeable." (App. at 6a).

These internal memos confirm that OCF was aware that it was subjecting insulators such as Dunn to injury.[2]

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[2] Contrary to OCF's suggestion in its Petition that Dunn was not injured, the trial judge noted that Dunn was covered in

OCF also knew that it was exposing itself to potentially thousands of lawsuits. Notwithstanding this knowledge, the Third Circuit noted that there was sufficient evidence before the jury for it to conclude that OCF never placed any warnings on its products prior to 1972 when asbestos insulation was no longer sold. (App. at 6a-7a).

As noted by the Third Circuit in its *en banc* opinion:

> In light of this evidence, we agree with the recent conclusion of the Virginia Supreme Court that
>
> > [t]he jury may have concluded . . . that Owens-Corning knew that inhalation of dust from its Kaylo product could cause lung disease in humans, that it actively concealed this danger, and it did not warn insulators of this hazard. . . .
>
> *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 642 (Va. 1992). The jury could reasonably have found that OCF acted with "reckless indifference to the rights of others" in this case. . . . (App. at 7a).

Indeed, the evidence of OCF's punitive conduct was so strong that the *en banc* dissent did not even suggest that the finding of punitive conduct was inappropriate. Moreover, OCF understandably has not even challenged this finding in its Petition.

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asbestos dust at work which his doctors concluded had caused Dunn to develop a serious progressive and incurable lung disease that would probably be the cause of his death. (App. at 89a-95a).

While the jurors heard evidence regarding OCF's conduct, OCF did not produce *any evidence* at trial of any prior awards of punitive damages against it. Thus, under the circumstances, it is clear that the jurors could only conclude that this would be the first and perhaps only award of punitive damages to be entered against OCF.

The only evidence of other punitive damage awards were submitted *after* the jury's verdict in post-trial motions submitted to the District Court Judge. This post-trial submission consisted of a self-serving affidavit listing other *alleged* verdicts of punitive damages against OCF which representation was not subject to the investigatory procedures of discovery or any challenge through cross-examination. As noted by the Third Circuit, even these submissions failed to demonstrate that OCF has ever paid any award of punitive damages. (App. at 33a).

OCF continued to add new representations to this affidavit at various stages throughout the post-trial and appellate process. Indeed, OCF's argument that it made only a limited profit on its total sales of asbestos products was only raised in the Third Circuit after the first panel opinion and just prior to the *en banc* argument. As noted by the Third Circuit, it was unwilling to act on evidence not introduced at the trial level and not subject to challenge by the Plaintiff. (App. at 36a). In rejecting this late submission as untimely, the Third Circuit noted that it was OCF's burden to make this evidentiary showing in the trial record, which it failed to do. (App. at 36a).

Not only did OCF fail to introduce evidence of any prior punitive damage awards against it to the jury, but the jurors also heard testimony which would directly

refute OCF's suggestion in its Petition that the threat of multiple awards may affect its financial condition since the jurors were told that OCF's financial statements affirmatively stated that the company's management did not believe that any of the pending or future asbestos litigation would have "a material adverse effect on the company's financial position." (App. at 127a).

As noted by the Third Circuit, OCF's current financial statements sent to shareholders and the SEC continue to refute its claim of financial ruin as OCF management continues to affirmatively state to the SEC and its shareholders as follows:

> [a]lthough any opinion is necessarily judgmental and must be based on information now known to the Company, in the opinion of management, based on the Company's experience with these claims to date, the Company's assessment of the number, nature and severity of the pending claims and the trends in the filing of such claims, and the Company's analysis of its available insurance coverage and existing reserves, and of the Company's future business and financial prospects, the additional uninsured costs which may arise out of pending personal injury and property damage asbestos claims and additional similar asbestos claims filed in the future *will not have a materially adverse effect on the Company's financial position*. (App. at 35a) (emphasis in original).

The Third Circuit found this statement so compelling in rejecting OCF's due process argument that it quoted the statement in the opinion. (App. at 35a). The Third Circuit also took note of OCF's $1.26 billion in unexhausted

insurance coverage as well as its reserves in excess of $100 million for future uninsured costs. (App. at 34a).

Thus, virtually *every* representation contained in OCF's Statement of the Case regarding specific facts related to the asbestos litigation was not contained in the trial record. In fact, OCF has even submitted additional information to this Court which was not fully contained in the Appellate record. OCF's action is apparently in response to the Third Circuit's criticism for not previously presenting this information while raising legal arguments unsupported by any established facts.[3]

With the foregoing comments in mind, it is now appropriate to turn to the comments raised in OCF's Petition.

I. The Circuit Courts all Agree that the Failure to Make a Proper Factual Record Bars Even Consideration of the Due Process Claim Now Being Raised By OCF.

At the outset, it must be pointed out that the relief the Petitioner seeks from this Court is quite extraordinary. The essence of the Petitioner's argument is that this Court should strike punitive damages in all asbestos cases pending against this Defendant because of the potential magnitude of the asbestos claims against it, the financial cost resulting from this litigation when compared to the alleged profits made from the product and the existence of other alleged punitive damage awards

[3] If information beyond the trial record could be considered, the fact that OCF's stock has increased from $15.00 a share at the time of the verdict in this case to $48.00 a share today would be relevant in addressing OCF's claim that multiple awards of punitive damages seriously affects its financial stability.

against the Petitioner. In short, the Petitioner complains that the threat of multiple awards of punitive damages violates its right to substantive due process.

As noted by the majority of the Third Circuit in rendering its *en banc* decision:

> We do not preclude a particular defendant from invoking the due process clause as a basis for relieving it of punitive damages in a specific case. However, the evidence produced by OCF falls far short of demonstrating any due process violation here.
>
> . . . .
>
> Assuming arguendo that we would accept this analysis, the factual record made by the defendant must, as a prerequisite to relief on due process grounds, include evidence demonstrating the amount of punitive damages it has actually paid in the past. In this case, OCF has simply failed to make such a showing.
>
> . . . .
>
> In sum, OCF simply has not made a "showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed . . . for . . . misconduct with respect to asbestos warnings."
>
> . . . .
>
> Nor has OCF shown on this record that it will be unable to satisfy current and future asbestos claims. Although the costs associated with asbestos litigation may have wiped out any profits OCF made from the sale of its Kaylo product, OCF failed to submit any evidence at trial concerning the profitability of its Kaylo product, or concerning the profits of the other

> manufacturers. (App. at pp. 32a-36a). (Citations omitted.)

Thus, it is clear that the factual basis necessary to even raise the issue that the Petitioner intends to argue was not properly made in the trial Court.

The result reached by the Third Circuit is in complete accord with the decisions of all other Circuits that have addressed this issue, which includes the Second, Fifth and Sixth Circuits. As noted by the Second Circuit in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2nd Cir. 1990), *cert. denied*, 497 U.S. 1057 (1990):

> In the pending case, the record is insufficient to support a due process ruling on either of the theories we have outlined. As to the single award approach, appellant made no showing that the jury in either of the two prior asbestos cases where punitive damages were awarded against Pittsburgh Corning had a complete record of the full extent of appellant's wrongful conduct in failing to warn all users of the dangers of its asbestos products, nor that either jury was instructed to return a punitive award appropriate as punishment for the totality of such misconduct. As to the aggregate award approach, appellant made no showing that the total of the two awards, $375,000, is even close to whatever limit due process might impose on the total punitive damages that may be assessed against Pittsburgh Corning for its misconduct with respect to asbestos warnings. *Id.* at 281.

See also, Racich v. Celotex Corp., 887 F.2d 393, 398 (2nd Cir. 1989) (holding that the due process argument requires a sufficient record at trial, demonstrating circumstances of prior punitive awards). All other circuits have reached

this same conclusion using similar language in rejecting this due process argument in asbestos related litigation. *See Solly v. Manville Asbestos Disease Fund*, 966 F.2d 1454 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 411 (1992); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 402-07 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985); *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1041-42 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

Indeed, rather than argue that the threat of multiple awards satisfied the deterrence purpose of punitive damages, OCF instead argued at trial that it did nothing wrong. The defendant in *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) took a similar approach by arguing that it did nothing wrong which the Fifth Circuit recognized as a legitimate trial tactic but one which prevented a subsequent change in position at the appellate level that the threat of such multiple awards satisfied the punishment and deterrence objectives of punitive damages.

In summary, OCF failed to raise this issue in a timely fashion. It failed to raise the issue prior to trial so that appropriate discovery could be done in order for the plaintiff to meet this challenge. OCF also failed to present this evidence during the trial so that it could be effectively challenged through cross-examination. It was only after the jury verdict that OCF sought to make this record. Under the circumstances, both the District Court and the Third Circuit properly refused to permit OCF to "judicially" add to the trial record.

Thus, the Third Circuit correctly concluded that OCF failed to make a factual record to even warrant consideration of a due process argument. As such, OCF's Petition should be denied by this Court as well.

II. There is Adequate Due Process Protection for Defendants Who Face Multiple Awards of Punitive Damages.

This Court has recently held in two separate decisions regarding due process challenges to punitive damage awards that a "general concern of reasonableness . . . properly enters into the constitutional calculus" in determining whether a particular award violates the due process clause. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). In this regard, there is already ample judicial protection against a violation of a defendant's due process when faced with exposure to multiple awards of punitive damages.

At the outset, it should be noted that in order to even raise this issue, it must be conceded that a party's conduct warrants an award of punitive damages and that this outrageous conduct has injured numerous people. In the matter *sub judice*, OCF does not dispute the sufficiency of the evidence regarding the finding that its conduct was done with reckless indifference and that this conduct injured Dunn. Moreover, OCF had to reasonably expect that this same conduct would injure thousands of workers and that their claims would be "sizeable."

Notwithstanding these presumptions, OCF argues that it should not be subject to multiple awards of punitive damages. The Illinois Appellate Court in *Froud v. Celotex Corporation*, 437 N.E. 2d 910 (Ill. App. 3rd 1982) *rev'd on other grounds*, 456 N.E. 2d 131 (Ill. 1983) put this issue into proper perspective when it stated as follows:

> . . . [W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages. *Id.* at 913.

See also, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 407 (5th Cir. 1986) (Holding that it is inconsistent to shield a defendant who commits an act that injures a "myriad of innocent persons" from punitive damages simply because of the "sheer magnitude of the wrong.")

Clearly multiple awards of punitive damages are not *per se* "unreasonable" when raised in the foregoing context so that the threat of multiple awards is not a *per se* violation of one's due process rights. Thus, the only remaining question is how to protect a defendant's right to due process when its conduct warrants consideration of such multiple awards of punitive damages.

The Virgin Islands has enacted a statute which adopts the *Restatement of Law* as established by the American Law Institute as the rule of law where no other

Virgin Islands statute is on point. 1 V.I.C. §4.[4] Thus, section 908 of the *Restatement, Second, of Torts* governs this issue by statute in the Virgin Islands. *Comment* "e" of the *Restatement* provides in part as follows:

> Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards. . . .

Pursuant to this section, the defendant must put into evidence other awards of punitive damages so that the trier of fact can decide what weight, if any, to give to both past and future awards. Had OCF done so in this case, the jury would have been so instructed to consider this evidence as required by the *Restatement*.

As noted in *Haslip*, a critical factor in guaranteeing a defendant's right to due process is an appropriate jury instruction. The instruction given by the trial court in this case was initially challenged by OCF, but both the District Court and the Third Circuit expressly found that the

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[4] Section 4 of Title 1 of the Virgin Islands Code provides in part as follows:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

instruction fully complied with *Haslip* (App. at 14a-20a).[5] Likewise, the other procedural safeguards required by *Haslip* were carefully analyzed by the District Court as well as *en banc* panel of the Third Circuit which concluded that these safeguards had been properly followed in this case. In fact, the application of these factors resulted in a substantial reduction of the jury verdict, which is indicative of due process protection given to OCF within this judicial proceeding.[6]

Interestingly, OCF has not argued in its Petition that the mandates of *Haslip* and *TXO* have not been fully adhered to by the lower court proceedings in this case. Having conceded that these safeguards have been met, OCF still argues that the imposition of multiple punitive damage awards violates its right to due process. The difficulty in accepting this argument is addressed by the numerous courts that have considered this issue. Some of these problems include:

1. Is the first award of punitive damages to be the only permitted award under a due process argument? If so, a defendant such as OCF could selectively stipulate to trying this issue in a friendly forum in a minor case and

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[5] The trial took place prior to *Haslip* but the post-trial and appellate proceedings fully analyzed the instruction and other procedural safeguards enunciated in *Haslip* which was rendered after the jury's verdict.

[6] The District Court was particularly protective of OCF's rights during the trial, as the Court bifurcated the punitive aspect of the case so as not to prejudice OCF during the liability phase of the trial. The Court also required the evidence of punitive damages to be proven by the higher standard of "clear and convincing" proof.

possibly escape with only a nominal award.[7] Further, if there is an award of $25,000 in this first trial, would it violate OCF's due process rights to face another award elsewhere?

2. Is the first plaintiff who recovers such an award the only plaintiff entitled to receive such an award? If so, have the due process rights of other victims been adequately protected as well?

3. Since obviously more than one award of punitive damages may appropriately be entered against OCF, at what number is the line drawn?

4. What if the evidence of punitive conduct against OCF elicited during a trial in 1989 does not include evidence subsequently obtained in discovery which further incriminates OCF? Is there a violation of OCF's due process rights if this subsequently discovered evidence is not considered for the first time by another jury in 1990?[8]

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[7] Indeed, the only final award against OCF presented in the post-trial submission was a punitive damage award of $80,000 where OCF stipulated to the amount in question. *See Owens-Illinois v. Armstrong*, 591 A.2d 544 (Md. Ct. Spec. App. 1991).

[8] For example, the trial in this case began in May of 1989. The trial judge became ill and subsequently died so that a mistrial was declared. Prior to the second trial in 1990, the 1950 letters of Dr. Schepers surfaced for the first time which told OCF that Kaylo was carcinogenic and a health hazard for insulators. Notwithstanding this fact, OCF's brochures described its product as "non-toxic" and safe. This evidence was a critical part of the Third Circuit decision affirming this award. (App. at 5a-6a). Should OCF's right to due process prevent consideration of this new evidence if there had been a prior award against it?

5. Is OCF's conduct over a 20-year period one course of conduct or numerous sets of misconduct?

6. Is there a percentage of OCF's gross sales, net profit or total assets that can be used to measure the total amount of punitive damages that will be permitted against OCF before its due process rights have been violated? For example, if OCF's total sales are one billion dollars, its net profits are 100 million dollars while its assets are valued at three billion dollars, what amount of punitive damages, if any, violates its right to due process?

These questions are just a few of the many complexities raised by the Circuit Courts in rejecting the various arguments that multiple awards of punitive damages constitute a *per se* violation of a defendant's due process rights. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2nd Cir. 1990). Moreover, the argument that there is a fixed point where courts can affirmatively state that one's due process rights have been violated by the imposition of multiple awards is contrary to this Court's decisions in both *Haslip* and *TXO* where this Court stated:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enters into the constitutional calculus. 499 U.S., at 18.

As noted by the majority opinion enunciated in *TXO*:

> The parties' desire to formulate a "test" for determining whether a particular punitive award is "grossly excessive" is understandable. . . .
>
> Still, it is not correct to assume that the safeguards in the legislative process have no counterpart in the judicial process. The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, *see Haslip*, 499 U.S., at 24-40.

This Court's analysis in *TXO* of how the judicial system should address the issue of due process by assuring the proper procedural safeguards exist so that a fair trial is given is the prevailing judicial answer to the question of due process as it relates to multiple punitive damages. At the very least, there should be a full ventilation by the lower courts of the principals enunciated in *TXO* before this Court should consider granting certiorari on the issues raised by OCF as the lower courts will probably not have difficulty in applying these principles.[9]

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[9] Indeed, this Court denied certiorari in a case that had been held in abeyance while *TXO* was being considered which

While this case by case approach may be contrary to OCF's preference for a final resolution of this issue, it is the only consistent approach that can be taken in this area where "reasonableness" is a measuring stick for due process.

Two further comments are in order. First, the issues raised by OCF are more appropriate for resolution by the legislative branch than the judicial forum. As noted by the Third Circuit:

> We do not disagree with the concerns that have been expressed about punitive damages awards, particularly in the asbestos cases. We differ instead with those who would have the judiciary resolve the conflicting policy arguments. We refrain from adopting such an activist role on what is essentially a policy matter, and believe that insofar as OCF would have us enunciate a prohibition of successive claims of punitive damages in mass tort litigation as a matter of Virgin Islands law, that decision is best left to the United States Congress or the legislature of the Virgin Islands. (App. at 29a).

Second, contrary to the notion advanced by OCF that it is facing skyrocketing punitive damage awards resulting in "overkill," the "underlying facts appear to be far

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raised these same issues. *Owens-Corning Fiberglas v. Adams*, 113 S. Ct. 3035, 125 L.Ed. 2d 722 (1993). With certiorari having been denied in *Adams* at the same time of the *TXO* decision, it would seem appropriate that at a minimum, the lower courts should be allowed time over the next several terms to ventilate the principals enunciated in *TXO* before considering whether it is necessary to hear these issues that have heretofore not been considered worthy of review by this Court.

from clear, despite high profile commentary" as noted by the Third Circuit. (App. at 31a). Indeed, as pointed out by the Third Circuit, OCF admits that the vast majority of asbestos claims that go to trial result in no verdict at all to the plaintiff. (App. at 31a). The Third Circuit also took note of one article the Court found to be quite thorough which concluded, after a review of numerous case studies, that punitive damage awards are relatively rare and are frequently reduced during the appellate process. *See Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of the Roscoe Pound Found. 1991).* As noted by the Court in *Leonen v. Johns-Manville Corp.*, 717 F.Supp. 272 (D.N.J. 1989):

> Moreover, while the "overkill" argument is not entirely without merit, defendants have not proffered any factual documentation which would persuade the Court to reject the reasoning in *Fischer* that defendants' fears are more speculative than real. There is nothing before the court which indicated that any of the defendants in this case are facing bankruptcy or that bankruptcy, if it should occur, will result more from the punitive damages awarded than the countless awards for compensatory damages. *Id.* at 286.

Thus, it is clear that even if OCF had properly preserved the necessary factual record to raise the multiple award/due process argument, there is no legal basis for granting certiorari in this case as OCF received ample due process in the proceedings below and the due process concerns of other defendants facing such multiple

awards can be appropriately resolved in the future by similar judicial treatment.

CONCLUSION

OCF failed to properly preserve the factual record to support even a realistic consideration of the constitutional issues that it raises in its Petition. Like the Third Circuit, this Court cannot be transformed into a fact-finding body in cases involving punitive damages where the evidence is never proffered for consideration by the jury or subjected to the rigors of pre-trial discovery. Such questions should be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process . . . to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Finally, the verdict in this case was subjected to the appropriate constitutional safeguards, insuring that OCF's right to due process was not violated. Additionally, judicial process can effectively address such due process concerns on a case by case basis whenever multiple awards of punitive damages might be imposed.

For the foregoing reasons, OCF's petition for certiorari should be denied.

Respectfully submitted,

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